

# ARKANSAS SUPREME COURT

No. CR 08-762

LEE MARK HARRIS  
Petitioner

v.

STATE OF ARKANSAS  
Respondent

Opinion Delivered      October 2, 2008

PRO SE MOTION FOR BELATED  
APPEAL [CIRCUIT COURT OF  
DESHA COUNTY, ARKANSAS CITY  
DISTRICT, CR 2006-126, HON.  
SAMUEL B. POPE, JUDGE]

MOTION TREATED AS MOTION FOR  
RULE ON CLERK AND GRANTED.

## PER CURIAM

On November 27, 2007, a jury found petitioner Lee Mark Harris guilty of possession of cocaine with intent to deliver and sentenced him to 960 months' imprisonment in the Arkansas Department of Correction. The judgment was entered on December 14, 2007, and on December 10, 2007, trial counsel representing petitioner, Mr. Don Warren, filed a notice of appeal. The appeal was not perfected and petitioner now brings this pro se motion for belated appeal.

As the notice of appeal was timely,<sup>1</sup> we treat the motion as a motion for rule on clerk to lodge the record. *See Ray v. State*, 348 Ark. 304, 73 S.W.3d 594 (2002). The time limit set in Arkansas Rule of Appellate Procedure--Civil 5(a), as applied through Arkansas Rule of Appellate Procedure--Criminal 4(a), requires that the record must be tendered to this court within ninety days of the date of the notice of appeal, unless the circuit court granted an extension of time. Here, no record was

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<sup>1</sup> Under Arkansas Rule of Appellate Procedure--Criminal 2(b)(1), a notice of appeal filed after the trial court announces a decision but before the entry of the judgment is treated as filed on the day after the judgment is entered.

tendered to our clerk, other than the partial record tendered on June 27, 2008, by petitioner proceeding pro se in conjunction with this motion.

Mr. Warren, as counsel for petitioner, was obligated to lodge a record in the appellate court in order to preserve the appeal. *See Langston v. State*, 341 Ark. 739, 19 S.W.3d 619 (2000) (per curiam). Under Arkansas Rule of Appellate Procedure–Criminal 16(a), once an attorney represents a defendant in a criminal matter, the attorney is obligated to continue representing the defendant until relieved by the appropriate court. *See Hammon v. State*, 347 Ark. 267, 65 S.W.3d 853 (2002). It is well settled that under no circumstances may an attorney who has not been relieved by the court abandon an appeal. *Holland v. State*, 358 Ark. 366, 190 S.W.3d 904 (2004) (per curiam).

This court will grant a motion for rule on clerk when the record was not timely lodged due to attorney error. *Rogers v. State*, 353 Ark. 359, 107 S.W.3d 166 (2003) (per curiam). When it is plain from the motion, any affidavits, and the record that relief is proper under our rule based upon attorney error, then relief will be granted. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). It is plain from the record here that Mr. Warren was at fault in failing to lodge the record in this court, and we therefore grant the motion for rule on clerk. As the motion is granted based upon attorney error, a copy of this opinion will be forwarded to the Committee on Professional Conduct. *See id.*

Petitioner includes within his motion a request to proceed *in forma pauperis* on appeal and has attached an affidavit in support of that request. We note, however, that Mr. Warren was retained counsel. The notice of appeal does not include a certification that financial arrangements had been made for obtaining the transcript, an affidavit indicating a reason for failing to so certify, or a petition to proceed as a pauper as required by Arkansas Rule of Appellate Procedure–Criminal 2. While that

defect is not sufficient to render the notice of appeal invalid, we are not able to determine whether arrangements were already in place to pay for the costs of the transcript. As a result, we decline to rule on petitioner's request to proceed *in forma pauperis* at this time. Because Mr. Warren remains responsible for representing petitioner on appeal, he may proceed with any motion in that regard as he may deem appropriate.

Our clerk is directed to lodge the partial record. Counsel is directed to file a petition for writ of certiorari within thirty days to call up the entire record, or that portion of it necessary for the appeal to proceed in this court.

Motion treated as motion for rule on clerk and granted.

Wills, J., not participating.